No. 339

In the Supreme Court of the United States

OCTOBER TERM, 1959

NEW HAMPSHIRE FIRE INSURANCE COMPANY,
PETITIONER

v.

THOMAS E. SCANLON, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The *per curiam* opinion of the court of appeals (R. 17–18) is reported at 267 F. 2d 941. The opinion of the district court (R. 14–16) is reported at 172 F. Supp. 392.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1959 (R. 19). The petition for a writ of certiorari was filed on August 22, 1959, and granted on November 9, 1959 (R. 20). 361 U.S. 881. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 28 U.S.C. 2463 authorizes a proceeding to quash a notice of levy for federal taxes, allegedly on property not belonging to the taxpayer, to be brought by a summary motion procedure rather than by an ordinary civil action governed by the Federal Rules of Civil Procedure.

STATUTES AND RULES INVOLVED

28 U.S.C. 2463; the Act of March 2, 1833, 4 Stat. 632; §§ 6331 and 6332 of the Internal Revenue Code of 1954 (26 U.S.C.); and Rules 1–3 of the Federal Rules of Civil Procedure are set forth in part in the Appendix, *infra*, pp. 36–40.

STATEMENT

On March 4, 1959, petitioner filed in the United States District Court for the Southern District of New York a motion[1] to quash certain notices of levy that had been served by respondent Scanlon, the District Director of Internal Revenue, upon the City of New York. The motion alleged the following (R. 4–9): Petitioner was the surety on performance and payment bonds furnished to the City of New York covering certain construction work being performed for the City by the taxpayer, Acme Cassa, Inc. After partial performance, Acme Cassa defaulted, and peti-

[1] Petitioner styled the application a "petition," and similar applications are variously referred to in the cases, without distinction, as either "motions" or "petitions." Since "motion" is the more descriptive term and is the nomenclature used in the Federal Rules (see F.R. Crim. P. 41(e) (motion for return of illegally seized property); F.R. Civ. P. 7(b)), that term will be used in this brief.

tioner, under the obligations of its bonds, paid off the suppliers and completed the work, expending for both purposes a total of $82,990.17 as of November 25, 1958. At various times between November 1, 1957, and May 21, 1958, respondent Scanlon had filed with the City, against amounts due on the construction contract, notices of lien and notices of levy for taxes due from Acme Cassa, of which the amount remaining unpaid was approximately $35,000. Because of the notices of levy, the City had refused to deliver to petitioner a warrant, already prepared as a partial payment on the contract, in the amount of $68,015.50[2] and will refuse to deliver a warrant for the final payment on the contract of $35,936.80. Petitioner alleged that as a completing surety, or by virtue of an assignment executed by Acme Cassa, it was entitled to receive the $68,015.50 warrant then available "free of the claim of the liens asserted" by respondent Scanlon. The motion joined the City and Acme Cassa as respondents and prayed that the notices of levy be quashed insofar as they restrained the payment to petitioner of the $68,015.50 warrant or, in the alternative, insofar as they restrained the payment of any sums in excess of the amount due respondent Scanlon from Acme Cassa.[4]

[2] Respondent Scanlon had, before the motion was filed, consented to the payment of $28,515.50 of that warrant (R. 8-9), so the amount being withheld under that warrant was actually only $39,500.

[3] The motion alleged that $15,021 due a different surety on another contract of Acme Cassa's was also being withheld under a notice of levy (¶19, R. 8), but that levy is not involved here.

[4] By stipulation of the parties filed in the district court on December 30, 1959, all amounts due by the City were released

Upon the motion being filed, an order to show cause was issued by the district court, to be served on or before March 25, 1959, directing respondents to show cause at a motion term of the court on March 31, 1959, why an order should not be entered quashing the notices of levy (R. 2–3). On April 16, 1959, the United States Attorney, on behalf of respondent Scanlon, filed an affidavit in opposition to the motion, stating that no summons and complaint in a civil action had ever been served (R. 11–12). On the same date, the district court dismissed the motion on the ground that there was no authority for the summary motion proceedings sought to be instituted and that petitioner must proceed instead by a plenary civil action (R. 14–16). The court of appeals affirmed the order in a *per curiam* opinion (R. 17–18).

SUMMARY OF ARGUMENT

1. The sole issue in this case is the narrow procedural one whether, assuming that petitioner can maintain an action against the district director to quash the levy, it can do so by a summary motion procedure rather than by an ordinary civil action. The significance of the question is whether the proceedings are to be governed by the Federal Rules of

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for payment to petitioner upon petitioner's agreement to deposit in the registry of the district court $31,000 in United States Treasury bonds (the amount of Acme Cassa's tax liability having by then been reduced to approximately $22,000), to be held pending the decision of this Court and any subsequent proceedings. The stipulation was without prejudice to the rights of the parties, which were to be determined in accordance with the rights under the original notices of levy.

Civil Procedure or by procedures adopted for the occasion by *ad hoc* orders of the court.

Petitioner claims that summary proceedings have been authorized here by 28 U.S.C. 2463, which provides that property seized under the internal revenue laws "shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." Petitioner contends that that provision places the property in the custody of the courts and that the courts have summary powers over property in their custody. That contention is supported neither by the history of § 2463, its text, the traditional bases for the exercise of summary powers, nor the provisions and policy of the Federal Rules.

2. Section 2463 originated as part of § 2 of the Act of March 2, 1833. Prompted by the South Carolina "Ordinance of Nullification," which had authorized replevy of property seized by federal customs officials, that Act contained extensive provisions forbidding state interference with revenue collections and creating exclusive federal jurisdiction over the subject matter. The text of the Act as a whole and the occasion for its passage show that those were its only purposes and there was no intent to modify the procedure in the federal courts or to substitute summary proceedings for the plenary proceedings theretofore required.

3. The "custody of the law" provision upon which petitioner primarily relies does not, as petitioner assumes, give to the courts "custody" of the property. The phrase is a term of art meaning neither more nor

less than that the property is not subject to attachment or other process. The provision simply gave to property seized by administrative process or powers the same protection against interference by other agencies that the common law had given to property seized under judicial process—subject of course to the powers reserved to the federal courts by the last clause of § 2463. It did not change the actual "custody" of the property or purport to define the powers of the federal courts with respect to it.

That meaning of the "custody of the law" provision is supported by other provisions of the 1833 Act which clearly show that it was the collector's custody that was to be protected against state interference, not some fictional custody in the federal courts. That is also the meaning of the phrase that seems expressly to have been accepted by this Court in *In re Fassett*, 142 U.S. 479.

4. Even if the provision be read as giving the courts some kind of "custody" of levied property, there would still be no authority for summary proceedings. The asserted general principle that a court may deal summarily with property *in custodia legis* obviously cannot be supported, for, since attached property is the very prototype of property *in custodia legis*, that would mean that any action *in rem* or *quasi in rem* could be by summary proceedings.

Nor is there any lesser ground on which summary proceedings can be supported. Summary powers to adjudicate the lawfulness of a property seizure have been exercised only where the property is in the custody of an officer of the court who is deemed to be

subject to the summary disciplinary powers of the court; where the proceeding is ancillary to a pending plenary action; or where the property was seized under an abuse of the court's own process. Clearly none of those bases is available here.

Summary powers of a different sort have been exercised in circumstances where the government, after a seizure, delays in bringing a forfeiture proceeding which a statute requires to be brought and makes the exclusive procedure for determination of the lawfulness of the seizure. To prevent the owner from being left remediless against the government's delay, it was early held that the court in which the forfeiture proceeding is required to be brought has power, on motion of the owner, to direct the government to institute the forfeiture proceeding promptly or else abandon the seizure. Although some courts have relied in part on § 2463 in support of that power, it is evident from the origin of the rule in a pre-§ 2463 dictum of Chief Justice Marshall that it rests instead on the general equitable powers of the court. In such cases, indeed, the motion proceeding can be viewed as being but a preliminary step in the plenary action sought to be precipitated and not an independent proceeding at all. In any event, those cases are of no aid to petitioner, which seeks by the summary proceedings to displace, not to precipitate, plenary proceedings.

5. Finally, whether or not the Federal Rules literally require that every proceeding not expressly excepted from their coverage be brought as a "civil action" governed by the Rules, the policy to provide

a uniform system of procedure in the federal courts requires at the least that no implied exceptions to the Rules be recognized without a persuasive demonstration of the necessity for departing from them. The summary judgment procedures provided by Rule 56 would seem to answer whatever legitimate claim petitioner may have for expedition, and no other reason for adopting the extraordinary summary procedure invoked here has been suggested.

ARGUMENT

I. INTRODUCTION

1. Petitioner, claiming that the director had levied upon property belonging to it rather than the taxpayer—or at least to which it claimed a right superior to the government's—brought this proceeding to have the respective rights to the property finally adjudicated and the notice of levy quashed as to any part of the property determined to belong to it. The proceeding was instituted, not by a complaint in a civil action, but by a motion and an order to show cause why the levy should not be quashed. There was then pending in the district court no other proceeding to which the motion was ancillary, the notice of levy having been administratively issued and requiring no judicial process or proceedings for its execution. The sole question presented is whether such a summary motion procedure is available, as an independent proceeding, to test the validity of the levy or whether, as

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[1] The statutes authorizing the levy procedure (§§ 6331 and 6332 of the Internal Revenue Code of 1954) are set forth in part in the Appendix, *infra*, p. 39.

the courts below held, the claimant must proceed by commencing a plenary civil action in accordance with the Federal Rules of Civil Procedure. The narrow question before this Court is solely a procedural one, the courts below having held, not that petitioner could not maintain a proceeding against the director to quash the levy but only that it must in any event do so by a plenary civil action rather than by motion. Hence, for purposes of this review, we will assume that a plenary civil action seeking the same relief could have been maintained.[6]

The significance of the question lies primarily in whether the steps in the proceeding are to be governed by the Federal Rules or by *ad hoc* orders of the court. The differences are evident even in the abortive proceedings already had in this case. While

[6] There are latent in the case other jurisdictional problems that would be presented even if the proceeding had been brought as a plenary civil action—*e.g.*, whether the suit is one against the United States and, if so, whether it has consented (see 28 U.S.C. 2410, consenting to suits to foreclose a lien on, or quiet title to, property on which the United States asserts a lien); whether the suit is one to restrain collection of a tax (see § 7421, Internal Revenue Code of 1954 (26 U.S.C. 7421)); and whether there is federal jurisdiction (see 28 U.S.C. 1340 (civil actions "arising under" the internal revenue laws)). The government's initial objection to the form of the service (R. 11-12) having been sustained by the district court, no other responsive pleading was filed and no other defenses raised. Accordingly, those questions were neither presented to nor decided by the courts below and are not presented here. And since those defenses, if any, would apply equally to a plenary or a summary proceeding, they have no bearing on the question presented here—*i.e.*, whether, even assuming that petitioner can maintain an action against the director to quash the levy, it can do so in a summary, rather than a plenary, proceeding.

the Federal Rules, recognizing the special time problems of inter-agency governmental action, allow the government 60 days, instead of the usual 20, in which to answer a complaint (Rule 12(a)), the order to show cause directed that return be made within 6 days. And, while the court in fact directed that service of the motion be made in the manner prescribed by the Federal Rules, presumably, under petitioner's theory, it was not required to do so and could have directed another manner of service. The form and content of the government's opposition to the motion were likewise not governed by the Rules, and such questions as the mode, time, and order of raising defenses were left indeterminate. Even more substantial differences might appear at the later stages of such a proceeding, such as the availability of the discovery procedures provided by the Rules and the nature of the hearing or trial to be had to resolve disputed issues of fact. The substantial question, in short, is whether the respective claims of petitioner and the government to the property are to be adjudicated according to the regular course of judicial procedure, governed by the Federal Rules, or in a summary motion proceeding governed by procedures improvised for the occasion by order of the court.

2. Although the statement of then District Judge Learned Hand that "It is clear that the owner of property unlawfully seized has without statute no summary remedy for a return of his property" (*United States* v. *Casino*, 286 Fed. 976, 978 (S.D.N.Y.)) must be qualified by certain recognized exceptions—as indeed it was later qualified by a panel of the Second Circuit which

included Judge Hand (*In re Behrens*, 39 F. 2d 561, 562) (see *infra*, pp. 24–28)—it remains valid as the general principle with which the inquiry must begin. That is, the fact that property has been wrongfully seized or detained by a government official does not by itself give the owner a right to seek its return by a summary proceeding. Like other suitors he must normally proceed by the ordinary course of judicial procedure to right the alleged wrong, and he may invoke extraordinary summary procedures only if a statute gives him that right or if there is some traditionally recognized basis for the exercise of summary powers. Cf. *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U.S. 426, 430–431.

Petitioner does not dispute that general principle but claims that summary proceedings in a case such as this are authorized by 28 U.S.C. 2463. That section, derived from § 2 of the Act of March 2, 1833, 4 Stat. 632, 633, and formerly codified as Rev. Stat. § 934, 28 U.S.C. (1940 ed.) 747, provides:

> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Petitioner contends, in substance, that by deeming property so detained to be "in the custody of the law," the statute gave the courts "custody" of the property and thereby invoked the allegedly established rule "that a court has summary jurisdiction over property in its custody." (Br. 10).

It may be noted at the outset that the implication petitioner finds in § 2463, if it be there, was overlooked for well over a century. The provision was originally enacted, in substantially its present form, in 1833, but it was not until 1952 that the Third Circuit expressly found in it authority to determine the rights to the property in a summary proceeding. *Raffaele* v. *Granger*, 196 F. 2d 620.[7] And to date no other court has found that meaning in the statute. While not conclusive that the provision will not bear the construction petitioner seeks to give to it, more than a century of silence is at the least persuasive evidence that no such result was intended.

We need not rely, however, on the lateness of petitioner's claim to defeat it, for, as we shall show: (1) the text of the 1833 Act as a whole and the circumstances of its passage make clear that the Act was concerned only with preventing state interference with tax collections and expanding federal jurisdiction, and not with regulating procedure in the federal courts; (2) that the phrase "in the custody of the law" means only that the property is immune from process and not, as petitioner assumes, that the courts have custody; (3) that even if the courts were given "custody" in some sense there is no general principle authorizing summary proceedings to adjudicate rights to property in the court's custody; and (4) that the policy underlying the Federal Rules re-

[7] The same court had, a dozen years earlier, upheld what appears to have been a similar proceeding, but without discussion of the procedural question. *Rothensies* v. *Ullman*, 110 F. 2d 590.

quires, at the very least, that departures from the procedures they prescribe be permitted only upon a clear showing of their inappropriateness, which has not been made here.

II. THE ACT OF MARCH 2, 1833, OF WHICH SECTION 2463 WAS A PART, REFLECTS NO PURPOSE TO AUTHORIZE SUMMARY PROCEEDINGS

The Act of March 2, 1833 (the original text of which is set forth in part in the Appendix, *infra*, pp. 36–38), of which the forerunner of § 2463 was a part (§ 2), was the Federal Government's answer to the "Ordinance of Nullification" adopted by South Carolina in an attempt to prevent collection of customs duties in that state.* The state ordinance had, among other things, provided for writs of replevin to reseize property distrained for duties and imposed severe criminal penalties on federal officers resisting such writs. The Act of March 2, 1833, in response, contained comprehensive provisions to overcome the state's resistance, including, in addition to what is now § 2463, provisions authorizing the collector to detain incoming vessels until the duties on their cargoes were paid (§ 1); making it unlawful for anyone to take such a vessel from the custody of the customs officers other than by process of a federal court (§ 1); temporarily (§ 8) authorizing the President to use federal troops to aid and protect customs officers in retaining custody of vessels (§ 1) or to overcome

* The history of the Act can be found in IX Gale & Seaton, *Register of Debates in Congress*, Part I, pp. 244 *et seq.* (1833).

forcible obstruction of the execution of federal laws or the process of federal courts (§ 5); extending federal jurisdiction to all cases arising under the revenue laws (§ 2); creating a federal cause of action for damages for injuries to revenue officers in the course of their duties (§ 2); making it a federal crime to dispossess or rescue property detained under the revenue laws (§ 2); and providing for the removal to the federal courts of any proceedings against revenue officers for acts done or rights claimed under the revenue laws (§ 3).

All of the provisions of the Act, it will be seen, were of a single piece: a comprehensive scheme to prevent state process or state force from interfering with customs collections and to center in the federal courts all litigation under the revenue laws. With the possible exception of the withdrawal of the remedy of replevin even in the federal courts, the Act was concerned only with the exclusion of the state courts and the expansion of the jurisdiction of the federal courts in revenue matters, and not with the regulation of procedure in the federal courts. And in the one case in which procedure was dealt with (the availability of replevin), the Act restricted, not expanded, the procedures available to aggrieved persons.[9] Thus

[9] In the light of the occasion which prompted the Act, there is obviously no basis for inferring that, in withdrawing the remedy of replevin, Congress must have intended to substitute some equally expeditious alternative proceeding. The Congress was not in a compromising mood; it simply withdrew in toto a particular form of remedy that had been used by the states to frustrate revenue collections. Replevin, moreover, did not afford a summary adjudication of the rights to the

to read the Act as broadly authorizing summary proceedings in lieu of the plenary suits theretofore required to challenge distraints is to find in the Act an unexpressed secondary purpose quite unrelated to—and, indeed, at odds with—the primary purpose evident in the express provisions.

III. SECTION 2463 DOES NOT GIVE THE COURTS CUSTODY OF PROPERTY DETAINED UNDER THE INTERNAL REVENUE LAWS

Turning to the interpretation of § 2463 itself, the question can readily be narrowed to that of the meaning of the "custody of the law" clause. The meaning of the anti-replevin clause is plain enough, as is at least the primary purpose of the clause making the property "subject only to the orders and decrees of the courts of the United States having jurisdiction thereof"—namely, to make the jurisdiction of the federal courts *exclusive* in such cases. It may be, as some courts have apparently held (*e.g., Seattle Association of Credit Men* v. *United States*, 240 F. 2d 906 (C.A. 9)), that the clause can also be read as an affirmative *grant* of federal jurisdiction independent of the general provision, also contained in § 2 of the 1833 Act (and now codified in 28 U.S.C. 1340), extending federal jurisdiction "to all cases * * * arising under the revenue laws." That question, however, is of no concern here, since a grant of jurisdiction in that sense in no way implies that the jurisdiction may be invoked by summary rather than plenary procedures,

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property: it permitted the plaintiff summarily to recover possession of the property, but the final disposition of the dispute was by plenary proceedings.

and we do not understand petitioner to contend otherwise.

It is on the "custody of the law" clause, therefore, that petitioner must, and does, rest its argument. Petitioner contends that that clause gives the courts summary powers over the property under an asserted rule "that a court has summary jurisdiction over property in its custody" (Br. 10; but see pp. 23–32, *infra*). The argument rests on the unstated premise that "custody of the law" means the same thing as "custody of the court." Our purpose in this Point is to show that that premise cannot be supported and that, in fact, "custody of the law" means something quite different from that.

1. The primary significance in the common law of the phrase "in the custody of the law" lies in the established doctrine that property "in the custody of the law" (or, *in custodia legis*) is not subject to process—for example, property that has been attached by one court is said to be "in the custody of the law" and hence not subject to attachment by another until released by the first. *E.g., Hagen* v. *Lucas,* 10 Pet. 400; *Taylor et al.* v. *Carryl,* 20 How. 583; *Freeman* v. *Howe et al.,* 24 How. 450. When the phrase is used in that sense, it connotes nothing more than the immunity of the property from process. That is, the only legal relationship it defines is the disability of other jurisdictions to reach the property by process, and not the powers, or even the identity, of the "custodian."

From that usage it is clear that the statement that property seized under the revenue laws "shall be deemed to be in the custody of the law" does not

necessarily mean anything more than that it shall be immune from process, and there is no reason to construe it as affecting the actual and legal custody of the revenue officials who seized it. In our view, the "custody of the law" provision simply gave to property seized under administrative process or powers the same protections against interference by others that the common law had given to property seized under judicial process—by the simple device of saying that it too shall be deemed to be "in the custody of the law." In short, far from conferring custody on the courts, the very purpose of the provisison was to protect the collector's custody. Since, however, the last clause of the section expressly reserved the power of the federal courts, the net effect was to protect property seized by revenue officials from state process. Protection of customs officials from dispossession by state process having been, as we have seen, the very need that prompted the 1833 Act, there is no basis for rejecting that simple and direct interpretation of the "custody of the law" provision.[10]

[10] See also Senator Wilkins' explanation of the effect of the sentence of § 2 of the 1833 bill that is now § 2463 (IX Gale & Seaton; *Register of Debates in Congress*, Part I, p. 259 (1833)):

> * * * It declares that property taken under the authority of the laws of the United States shall be irreplevi-able, and only subject to the order and decrees of the courts of the United States * * *. This section has two objects in view: * * * second, it provides that they [customs officers] shall not be dispossessed of property seized by them under the laws of the General Government, without the authority of the courts of the United States. * * *

That statement seems clearly to reflect the understanding that the purpose of the provision was to protect the possession of

2. In contrast, an attempt to read into the "custody of the law" provision a purpose to create some kind of legal relationship between the court and the property—*i.e.*, to give the court "custody" of the property—leads only to the erection, without supporting foundation, of an elaborate and useless fiction. Clearly, of course, § 2463 does not affect the actual custody of the collector, who remains free, unless the court affirmatively intervenes, to release, sell, or otherwise dispose of the property without the permission of the court. And that being so, it is equally clear that the court cannot effectively exercise power over the property without first issuing process, either *in rem* or *in personam*. Nor is the court even aware of when its "custody" begins or ends. The "custody" claimed to have been given the court thus appears to have had no effect whatever and to have given the court no powers it did not already possess—other than the indirect effect now claimed of authorizing the court, once it does obtain actual jurisdiction of the property by process, to proceed summarily. And that there was no reason to create such a fictitious custody seems evident, since it was wholly unnecessary in order to achieve the only apparent purpose of the provision—namely, to protect the property against state process.

The form of the provision also seems inappropriate as a provision designed to give a court "cus-

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the customs officers as such—subject of course to the ordinary powers of the federal courts reserved by the last clause—and not to confer "custody" or special summary powers on the "courts.

tody" of the property, since it fails even to identify the court. If the omission be supplied by assuming that it means the court in whose territorial jurisdiction the property is located, problems would arise when the property is removed, as it may be without leave of court, to another jurisdiction: does the "custody" shift or does it remain in the original court, thereby depriving the court in the removed jurisdiction—which is otherwise the court "having jurisdiction thereof" within the meaning of the last clause of § 2463—of its power to act? In sum, we submit, the concept that property seized by revenue officials is automatically in the custody of a court is an altogether awkward, contrived, and useless fiction, to which there is no reason to think that Congress resorted.

3. The proper interpretation of the "custody of the law" clause becomes even clearer when the provision is read in its original context in the 1833 Act. Section 1 of that Act was a temporary provision, to be in effect until the end of the next session of Congress (§ 8), authorizing the President to use federal troops in aid of customs collections. That section, after authorizing the collector to seize and detain incoming vessels until the duties were paid, provided that "it shall be unlawful to take the vessel or cargo from the custody of the proper officer of the customs, unless by process from some court of the United States", and empowered the President to use military force "for the purpose of preventing the removal of such vessel or cargo, and protecting the officers of the customs in retaining the custody thereof." That sec-

tion made clear that the custody of the property so detained was in the customs officials and temporarily authorized the use of troops to protect that custody against any interference other than by process of the federal courts. Yet the same property was declared by § 2 (now § 2463) to be deemed "in the custody of the law". Under our interpretation of that phrase as simply giving to the collector's custody protection against interfering process, with the exception of the powers expressly reserved to the federal courts, the two sections are entirely consistent. They are identical in the substantive rules declared—the collector's custody is protected against all interference except by process of the federal courts—with § 2 permanently enacting those rules and § 1 temporarily authorizing the use of military force for their vindication. Under petitioner's interpretation, however, while Congress in § 1 protected the collector's custody as such—making it "unlawful" for anyone other than the federal courts to interfere with that custody—in § 2 it unaccountably abandoned that approach and, instead of directly protecting the collector's custody, found it necessary to declare a fictional custody in the courts and then protect the court's custody from state process. While § 1 remained in force, moreover, the two sections were simultaneously applicable, with the result, under petitioner's view, that the same property was at once declared to be in the legally-protected custody of the revenue officers (§ 1) and in the legally-protected custody of the courts (§ 2).

4. Our interpretation of the "custody of the law" provision—*i.e.*, as protecting the collector's custody rather than giving custody to the courts—appears to have been accepted by this Court in *In re Fassett*, 142 U.S. 479. There, the collector of customs had seized a vessel for payment of import duties. The owner promptly brought an *in rem* action in admiralty for the recovery of the vessel, and the marshal, under attachment process, seized the vessel from the custody of the collector. The collector sought in this Court a writ of prohibition against the admiralty proceedings, claiming that, since the vessel had been duly detained under the revenue laws, it was, under § 2463 (then R.S. 934), in the "custody of the law" and hence immune from attachment in the admiralty action. That is, it was claimed that the "custody of the law" provision so protected the collector's custody that the property was beyond the reach of process even of a federal court otherwise having jurisdiction. This Court, although rejecting the conclusion that the property was immune from federal process, on the ground that the statute expressly made it subject "to the orders and decrees of the" federal courts, accepted the premise that it was the collector's custody that was the "custody of the law," saying (p. 486):

> * * * while it [the vessel] was so in the custody of the law that it must continue to be detained by the collector, subject "only to the orders and decrees of the courts of the United States having jurisdiction thereof," it was subject to such orders and decrees.

It may be seen that the claims made in the name of "the custody of the law" have come full circle since the *Conquerer* was seized by collector Fassett for taxes. It was there claimed that the "custody of the law" put the property beyond the reach even of a federal court sitting in a plenary proceeding in which jurisdiction of the collector was obtained by personal service and jurisdiction of the property was sought to be obtained by attachment. It is now claimed that the same provision gives the *court* such uniquely total powers over the property that it may summarily dispose of it on motion, without the necessity even of a plenary action. In our view, petitioner's claim is no better founded than was Fassett's at the other extreme, and the correct view remains that first espoused by this Court: it is the collector's custody that § 2463 protects as "the custody of the law", but that custody is not immune from the otherwise competent process of the federal courts.

It must be admitted that some lower courts have assumed that the effect of the "custody of the law" provision was to bring the property within the custody of the court and thus in some way to enhance the court's powers over the property.[11] They did so, however, without even alluding to the possibility that

[11] That was clearly the basis for the Third Circuit decisions relied on by petitioner. *Raffaele* v. *Granger*, 196 F. 2d 620; *Ersa, Inc.* v. *Dudley*, 234 F. 2d 178. The nature of the partial reliance on § 2463 in support of the limited summary proceedings allowed in *Standard Carpet Co.* v. *Bowers*, 284 Fed. 284 (S.D.N.Y.); *Gillam* v. *Parker*, 19 F. 2d 358 (E.D.S.C.); *In re Behrens*, 39 F. 2d 561 (C.A. 2); and *Goldman* v. *American Dealers Service*, 135 F. 2d 398 (C.A. 2)—*i.e.*, for what purpose it was relied on and whether the reliance was on the

the phrase might have another meaning or to the implications of this Court's decision in *Fassett*. Nor does it appear that the parties raised the point. Perhaps part of the reason for the oversight was the codification of what is now § 2463 separately from the other provisions of the 1833 Act, for it is only in the context of the original statute that the true purpose and meaning of the provision become clear. Whatever the reason, however, those cases, in which the point was neither argued nor discussed, cannot be deemed authoritative decisions on the question. And in any event, they hardly militate against the controlling authority of this Court's decision in *In re Fassett*.

IV. THERE IS NO AUTHORITY FOR SUMMARY PROCEEDINGS EVEN IF THE PROPERTY BE DEEMED IN THE CUSTODY OF THE COURT

Even if petitioner's contention that "custody of the law" means "custody of the court" be accepted for purposes of argument, it does not follow that petitioner may proceed by motion in summary proceedings. Petitioner's claim that any property in the custody of the court is for that reason alone subject to the court's summary powers obviously claims too much and can be dismissed at once as untenable. That argument is based on the Third Circuit's assertion, without citation of authority, that "a plenary civil suit is not necessary to enable a court to exercise

"custody of the law" provision or the last clause of the section—is less clear, but those cases can be more satisfactorily explained on another ground (see *infra*, pp. 28-31 and note 11).

jurisdiction over property thus *in custodia legis.*" *Raffaele* v. *Granger,* 196 F. 2d 620, 623. When it is recognized that the prototype of property *in custodia legis* is property which has been attached or otherwise brought within the court's jurisdiction by process, it becomes evident that that statement cannot be maintained as a general principle, for it would mean that any action *in rem* or *quasi in rem* could be brought as a summary proceeding outside the Federal Rules of Civil Procedure. If petitioner's position can be sustained at all, therefore, it must be on some more limited ground than that asserted. We will show, however, that there is present here none of the elements that have traditionally been thought to justify summary proceedings.

We will confine the discussion to the circumstances in which summary powers have been exercised in aid of a claimant's right to recover property seized by government officials. The summary powers exercised in other contexts—*e.g.*, in bankruptcy proceedings (see *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U.S. 426)—seem *sui generis* and their development affords little guidance here. A distinction must also be drawn between the use of summary powers finally to adjudicate the rights to the property and their use for the limited purpose of precipitating a plenary action in which the rights may be determined, and the two classes of cases will be separately discussed.

A. THE LIMITED GROUNDS ON WHICH SUMMARY POWERS HAVE HISTORICALLY BEEN EXERCISED TO DETERMINE THE LEGALITY OF SEIZURES ARE NOT PRESENT HERE

Most of the cases allowing summary proceedings, by motion or otherwise, for the return of seized prop-

erty involved property that had allegedly been seized in violation of the Fourth Amendment and was being detained for use as evidence in criminal proceedings. A motion procedure for that purpose is now expressly authorized by Rule 41(e) of the Criminal Rules, but we may assume that the principles developed before the Rule was adopted continue to have vitality in other areas.

In allowing summary proceedings for the return of seized property, the courts have relied on what seem to be three distinct bases for the exercise of summary powers. None of them, as we shall show, is present here.

1. The ground most frequently relied upon is that the property, alleged to have been unlawfully seized, is in the possession of an "officer of the court" (usually, the United States Attorney) who is subject to the summary disciplinary powers of the court. *Cogen v. United States*, 278 U.S. 221; *Weeks* v. *United States*, 232 U.S. 383; *United States* v. *Gowen*, 40 F. 2d 593 (C.A. 2), affirmed on this point *sub nom. Go-Bart Importing Co.* v. *United States*, 282 U.S. 344; *United States* v. *Maresca*, 266 Fed. 713 (S.D.N.Y.). The summary power thus exercised, said to be based on "an elementary principle, depending upon the inherent disciplinary power of any court of record" (*United States* v. *Maresca*, *supra*, at p. 717), is analogous to the power summarily to punish officers of the court for contempt (cf. *Cammer* v. *United States*, 350 U.S. 399), and on occasion the two questions have been treated as being identical (*In re Chin K. Shue*, 199 Fed. 282 (D. Mass.)).

Government officials not themselves acting in a prosecutorial capacity, however, are not considered to be "officers of the court" in the sense required to submit them to the summary disciplinary powers of the court, and summary proceedings will not lie to recover property held by them in the absence of some other basis for summary action. *In re Behrens*, 39 F. 2d 561 (C.A. 2) (prohibition agent); *Applybe* v. *United States*, 32 F. 2d 873 (C.A. 9), rehearing denied, 33 F. 2d 897 (prohibition agent); *United States* v. *Hee*, 219 Fed. 1019 (D.N.J.) (revenue agent); *In re Chin K. Shue*, *supra* (customs agent); *Sims* v. *Stuart*, 291 Fed. 707 (S.D.N.Y.) (collector of customs); cf. *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, holding that papers in the physical possession of a prohibition agent could be recovered in a summary proceeding on the grounds that the agent had participated, under the control of the United States Attorney, in the preliminary criminal proceedings before the Commissioner and subjected himself to the disciplinary powers of the court, and that the United States Attorney had effective control of the papers. Since the respondent here, the District Director of Internal Revenue, is not an "officer of the court" subject to the disciplinary powers of the court, those cases afford no basis for the summary proceeding here.

2. Where the motion for the return of illegally-seized property is made after an indictment or information has been filed, a further basis sometimes relied upon for permitting the motion procedure is that the proceeding is not an independent one but a "part" of

and ancillary to the criminal action that is already pending in the same court and thus no plenary action is required. *Cogen* v. *United States, supra; Applybe* v. *United States, supra; Weinstein* v. *Attorney General,* 271 Fed. 673 (C.A. 2); *United States* v. *Maresca, supra; United States* v. *Wilson,* 163 Fed. 338 (S.D. N.Y.). An analogous principle was invoked in *Krippendorf* v. *Hyde,* 110 U.S. 276, to allow a third party claiming ownership of property attached in a federal diversity action as property of the defendant to bring a "dependent" proceeding in the same court to protect its interest in the property without independently satisfying federal jurisdictional requirements, the Court noting in addition that the trial court might adopt any procedure appropriate to the resolution of the collateral title dispute without interfering with the main action.[12]

What comfort petitioner seeks to draw from *Krippendorf* (Br. 10) is not clear, since the very basis for the decision there was that the intervenor's application could be treated as a dependent part of the plenary action already pending, whereas here the proceeding is admittedly an independent one which must stand on its own feet.

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[12] The problem presented in *Krippendorf* has of course now been resolved by Rule 24(a)(3), permitting a third party so situated to intervene by motion in the pending action. In view of petitioner's apparent reliance on the suggestion in *Krippendorf* that the trial court might, if appropriate, use summary procedures to resolve the collateral title dispute, it is noteworthy that the Rules now require that the motion to intervene be accompanied by an appropriate pleading (Rule 24(c)), and proceedings thereon are fully governed by the Rules.

3. A third basis for summary proceedings for the return of illegally-seized property has occasionally been invoked where the property was seized under the purported authority of a search warrant issued by the court's authority—namely, that the court has inherent summary powers to control its own process and to prevent abuse of that process. *Weinstein* v. *Attorney General, supra; United States* v. *McHie,* 194 Fed. 894 (N.D. Ill.); cf. *United States* v. *Casino, supra.* But see *In re Chin K. Shue, supra.* That basis for summary action obviously can have no application here, since the levy was effected, not by judicial process, but by independent administrative process not requiring judicial aid for its execution.

B. THE EQUITABLE POWERS OF A COURT, ON MOTION, TO PREVENT DELAY IN THE COMMENCEMENT OF A REQUIRED PLENARY ACTION BY THE GOVERNMENT ARE INAPPLICABLE HERE

A quite different use of summary powers—not to adjudicate the claims to the property but to precipitate a plenary action in which they can be adjudicated—appears in cases in which the government has seized property for forfeiture or similar proceedings under a statute which is construed as making the forfeiture proceedings the exclusive procedure for the determination of any claims to the property. Since the owner cannot himself bring an action to recover his property but must await the commencement of the forfeiture proceedings by the government, he is left remediless during any delay by the government in bringing the required forfeiture proceedings. To prevent an unreasonable delay by the government, it was early held, following a dictum by Chief Justice Mar-

shall,[13] that the court that would have jurisdiction of the forfeiture proceedings could, on motion of the owner, require the government officials to institute the forfeiture proceedings without unreasonable delay or else abandon the seizure and return the property. *Church* v. *Goodnough*, 14 F. 2d 432 (D. R.I.); *Standard Carpet Co.* v. *Bowers*, 284 Fed. 284 (S.D.N.Y.); *Gillam* v. *Parker*, 19 F. 2d 358 (E.D.S.C.); *In re Behrens*, 39 F. 2d 561 (C.A. 2); *Goldman* v. *American Dealers Service*, 135 F. 2d 398 (C.A. 2); cf. *Margie* v. *Potter*, 291 Fed. 285 (D. Mass.) (return ordered when criminal prosecution, on which forfeiture depended, was dropped).

Although in a number of those cases (*Standard Carpet*, *Gillam*, *Behrens*, and *Goldman*) the court relied in part on § 2463,[14] we submit that the power does

[13] "* * * If the officer has a right, under the laws of the United States, to seize for a supposed forfeiture, the question, whether that forfeiture has been actually incurred, belongs exclusively to the federal courts, and cannot be drawn to another *forum*: and it depends upon the final decree of such courts, whether such seizure is to be deemed rightful or tortious. If the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the district court may, upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure." *Slocum* v. *Mayberry*, 2 Wheat. 1, 9-10.

[14] For precisely what purpose § 2463 was cited in those cases is not clear. It seems to have been used primarily to overcome any doubt that, because the forfeiture proceeding to be brought by the government was the statutorily-exclusive remedy, the courts were without power to interfere in any way with the government's possession pending such a proceeding. That would explain the courts' seemingly main reliance on the last clause of § 2463 rather than the "custody of the law" provision (though the two were usually quoted together), using

not depend upon that provision but derives instead from the general equity powers of the court—as, indeed, is shown by Chief Justice Marshall's pre-§ 2463 dictum in *Slocum* v. *Mayberry* and the primary reliance on that dictum in the formative *Gillam* and

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that clause in essentially the same way that it was used in *In re Fassett* (*supra*, p. 21)—*i.e.*, since the last clause expressly made the officials' possession of the property "subject only to the orders and decrees" of the federal courts, they could not claim complete immunity from the process of the federal courts pending the forfeiture and were subject to whatever orders the courts otherwise (*i.e.*, under *Slocum*) had power to enter.

The ambiguity of the reliance on § 2463 arises largely from a failure to separate the several questions involved. In each case, the owner had prayed for a determination on the merits that the seizure was wrongful and a return of the property. The courts first held that no summary proceeding would lie for that purpose, both because such questions could be determined only in a plenary suit and because a forfeiture proceeding by the government was the exclusive remedy. It was then held, however, that the owner was not denied all relief, for the courts did have power to require prompt commencement of the forfeiture proceeding. At that point there logically remained a separate procedural question—*i.e.*, whether an application even for the limited relief of requiring a forfeiture proceeding to be brought had to be made in a plenary action, or could be made by motion. That question, however, seems never to have been separately discussed and appears not to have been a real issue in those cases. The explanation, we suggest, is that it was accepted by all that, if the court did have power to direct the government to institute a forfeiture proceeding, the proper way to seek that relief would be by a motion to require the government to show cause for its delay—if only to avoid the evident and fruitless circuity of requiring a plenary action simply to cause another plenary action to be brought. Hence, we submit, the reliance on § 2463, although not clearly articulated, was only in support of the power of the court to grant the relief at all and not on the procedural question of the form in which the application should be made.

Behrens cases. As explained by the court in the *Church* case, which placed no reliance on § 2463, the seizing officers are required by statute promptly to institute judicial proceedings for the condemnation of the property, and under general equitable principles, if not indeed to satisfy the requirements of due process, the court in which the proceedings are required to be brought must also have the power to require that they not be delayed indefinitely while the owner is deprived of a hearing. A summary proceeding, not to obtain final relief, but for the limited purpose of requiring a plenary action to be instituted, can, moreover, be viewed as being not an "independent" proceeding but simply a preliminary step in the institution of the plenary action and in that sense ancillary to the suit sought to be precipitated. Or, finally, the unjustified delay of the government officials in bringing the required judicial proceedings can perhaps be viewed as an abuse of judicial process and hence subject to a summiary power in the court to prevent abuse of its processes.

Whatever the rationale, however, it is patent that the power thus exercised to precipitate a statutorily required proceeding by the government in deference to which other remedies have been foreclosed to the claimant can have no application here. Petitioner seeks, not to have a plenary suit commenced by the government—and the statute requires none—but to have its claims finally adjudicated in the summary proceeding itself. Nor does it claim that it is not equally able to seek the same relief by a plenary suit; it claims only that it is entitled to the added proce-

dural advantages of a summary proceeding. Petitioner's claim, in short, is the very antithesis of the basis for summary proceedings to require institution of a plenary suit by the government and it can draw no support from the cases granting such relief.[15]

V. PETITIONER HAS SHOWN NO REASON FOR DEPARTING FROM THE PROCEDURES PRESCRIBED BY THE FEDERAL RULES OF CIVIL PROCEDURE

We have thus far sought to show that there is no basis for a summary proceeding in this case quite apart from the effect of the Federal Rules of Civil Procedure. In the end, however, perhaps the most important consideration in this case is the integrity of the Federal Rules, and in our view the Rules would be controlling here even if there were some basis in the pre-Rules practice for a summary proceeding.

With stated exceptions (Rule 81) not applicable here, the Rules "govern the procedure * * * in all

[15] Of course in those cases the courts' orders were in the form of requiring the government to return the property *unless* it commenced forfeiture proceedings within a stated period, but the conditional order for the return of the property was imposed only as a sanction to require prompt proceedings and was not based on an adjudication on the merits. Petitioner's contention that if the courts have summary power to order the return of property conditionally they must also have such power, in their discretion, to adjudicate the claims to the property and order its return absolutely (Br. 7–10) reflects a uniquely motolithic concept of judicial powers and ignores the very object for which summary powers were exercised in those cases. Summary powers were used there in aid of the claimant's right to have plenary consideration of his claims in a plenary suit; they are invoked here to have plenary and final adjudication of the claims in the summary proceeding itself. They were exercised there to precipitate, here to short-circuit, a plenary suit.

suits of a civil nature" (Rule 1), prescribe that there "shall be one form of action to be known as 'civil action'" (Rule 2), and direct that such an action be commenced by filing a complaint (Rule 3). The term "suits" as used in Rule 1 seems sufficiently broad to include any independent proceeding by which judicial relief is sought, whether traditionally brought in a summary or plenary form, and thus to permit no exceptions to the procedures prescribed by the Rules other than those expressly provided for. In our view, however, it is not necessary now to say that there is no circumstance in which a summary proceeding not expressly excepted from the Rules could be brought,[16] for even if the possibility of an implied exception be assumed no possible justification for such an exception has been shown here.

The Rules were designed as a uniform code of procedure for the federal courts, adequate, with the flexibility which they themselves provide, "to secure the just, speedy, and inexpensive determination of every action" (Rule 1). And the value of the Rules lies not only in the utility of their provisions for the orderly conduct of a lawsuit, but also in the predictability and universality of their application. If those underlying policies are to be served, it is essential, we think, that implied exceptions to the controlling force of the Rules be allowed, if at all, only upon the most

[16] While we doubt its existence, we are not now prepared to assure the Court that there is no circumstance that can arise in which it would be clearly inappropriate to require the procedures of a plenary action to be followed. Since it seems unnecessary for purposes of this case, we see no reason now to foreclose that possibility.

compelling showing of the necessity and justification for departure. Cf. *United States* v. *Robinson*, No. 16, this Term, decided January 11, 1960.

The proceeding in this case is neither more nor less than a typical action to resolve a title dispute between adverse claimants to property and, as such, seems clearly to be a "suit" in every accepted meaning of the word. Even if, before the Rules, it could have been maintained as a summary proceeding because of some fictional judicial "custody," such a fiction by itself affords no justification for departing from the procedures prescribed by the Rules as those most appropriate for the resolution of all similar disputes. Nor has any other reason been suggested by petitioner for singling out this class of cases for special treatment.

It may be noted, finally, that the flexible procedures provided by the Rules seem fully adequate to meet whatever legitimate claims for expedition petitioner may have. If there are no issues of fact—which cannot be determined from the present pleadings—petitioner could in a civil action move for summary judgment 20 days after its complaint was filed, a hearing could be held 10 days later, and judgment could issue "forthwith" (Rule 56).[17] Those procedures were designed to afford the very expedition that petitioner seeks, and if they are inadequate petitioner has failed to say why. If, on the other hand, there are issues of fact to be tried, no reason appears why the procedures provided by the Rules are not those best suited to resolve them.

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[17] In addition, of course, there are even more summary procedures for interim injunctive relief pending final adjudication. See Rule 65.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed, without prejudice, on remand of the case to the district court, to petitioner's requesting that court to treat the "petition" filed in the cause as a complaint in a civil action and to proceed with the action in accordance with the Federal Rules of Civil Procedure.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 2463 provides:

> SEC. 2463. All property taken or detained under any revenue law of the United States shall not be replevinable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

2. The Act of March 2, 1833, 4 Stat. 632, provided in part:

> SEC. 1. Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, it shall become impracticable, in the judgment of the President, to execute the revenue laws, and collect the duties on imports in the ordinary way, in any collection district, it shall and may be lawful for the President to direct that the custom-house for such district be established and kept in any secure place within some port or harbour of such district, either upon land or on board any vessel: and, in that case, it shall be the duty of the collector to reside at such place, and there to detain all vessels and cargoes arriving within the said district until the duties imposed on said cargoes, by law, be paid in cash, deducting interest according to existing laws; and in such cases it shall be unlawful to take the vessel or cargo from the custody of the proper officer of the customs, unless by process from some court of the United States; and in case of any attempt otherwise to take such vessel or cargo by any force, or combination, or assemblage of persons too great to be overcome by the officers of the customs, it shall and may be lawful for the President of the United States, or such person

or persons as he shall have empowered for that purpose, to employ such part of the land or naval forces, or militia of the United States, as may be deemed necessary for the purpose of preventing the removal of such vessel or cargo, and protecting the officers of the customs in retaining the custody thereof.

SEC. 2. The jurisdiction of the circuit courts of the United States shall extend to all cases, in law or equity, arising under the revenue laws of the United States, for which other provisions are not already made by law; and if any person shall receive any injury to his person or property for or on account of any act by him done, under any law of the United States, for the protection of the revenue or the collection of duties on imports, he shall be entitled to maintain suit for damage therefor in the circuit court of the United States in the district wherein the party doing the injury may reside, or shall be found. And all property taken or detained by any officer or other person under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. And if any person shall dispossess or rescue, or attempt to dispossess or rescue, any property so taken or detained as aforesaid, or shall aid, or assist therein, such person shall be deemed guilty of a misdemeanour, and shall be liable to such punishment as is provided by [§ 22, Act of April 30, 1790] for the wilful obstruction or resistance of officers in the service of process.

SEC. 3. In any case where suit or prosecution shall be commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or for or on account of any right, authority, or title, set up or claimed by

such officer, or other person under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution, at any time before trial, upon a petition to the circuit court of the United States; * * *; which petition, affidavit and certificate, shall be presented to the said circuit court, * * * and the cause shall thereupon be entered on the docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court * * *.

* * * * *

SEC. 5. Whenever the President of the United States shall be officially informed, by the authorities of any state, or by a judge of any circuit or district court of the United States, in the state, that, within the limits of such state, any law or laws of the United States, or the execution thereof, or of any process from the courts of the United States, is obstructed by the employment of military force, or by any other unlawful means, too great to be overcome by the ordinary course of judicial proceeding, or by the powers vested in the marshal by existing laws, it shall be lawful for him, the President of the United States, forthwith to issue his proclamation, declaring such fact or information, and requiring all such military and other force forthwith to disperse; and if at any time after issuing such proclamation, any such opposition or obstruction shall be made, in the manner or by the means aforesaid, the President shall be, and hereby is, authorized, promptly to employ such means to suppress the same, and to cause the said laws or process to be duly executed, as are authorized and provided in the cases therein mentioned by the [Acts of February 28, 1795 and March 3, 1807].

3. Sections 6331 and 6332 of the Internal Revenue Code of 1954 (26 U.S.C.) provide in part:

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

(b) *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * * *

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * * * *

4. Rules 1–3 of the Federal Rules of Civil Procedure provide:

RULE 1. These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in

equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

RULE 2. There shall be one form of action to be known as "civil action".

RULE 3. A civil action is commenced by filing a complaint with the court.

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